UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KAHRAMAN SADIKOGLU,	:	
	:	
Plaintiff,	:	
	:	
v.	:	11 Civ. 0294 (PKC)
	:	
UNITED NATIONS DEVELOPMENT PROGRAMME,	:	
	:	
Defendant.	:	
	:	

STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

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PRELIMINARY STATEMENT

The United States of America, by and through its attorney, Preet Bharara, United States Attorney for the Southern District of New York, respectfully submits this Statement of Interest pursuant to 28 U.S.C. § 517[1] to address the question raised by the Court in a letter to the United States Department of State dated March 18, 2011, concerning whether defendant the United Nations Development Programme ("UNDP") is immune from this suit.

As detailed below, the UNDP is a program and integral part of the United Nations ("UN"), and, as such, is absolutely immune from suit and legal process absent an express waiver. *See* Charter of the United Nations ("UN Charter"), June 26, 1945, 59 Stat. 1031; Convention on Privileges and Immunities of the United Nations ("General Convention"), *adopted* Feb. 13, 1946, 21 U.S.T. 1418, 1 U.N.T.S. 16. There is no merit to Plaintiff's arguments against finding that the immunities of the UN, including UNDP, are applicable here, both because of the governing treaties' plain meaning and because the Court owes deference to the Executive Branch's interpretation of those treaties. In light of the UN's immunity, and the lack of allegations or evidence of an express waiver, the Court lacks subject matter jurisdiction over this matter. *See Brzak v. United Nations*, 551 F. Supp. 2d 313, 318 (S.D.N.Y. 2008), *aff'd*, 597 F.3d 107 (2d Cir. 2010); *see also* Fed. R. Civ. P. 12(h)(3).

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[1] That statute provides: "The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interest of the United States in a suit pending in a court of the United States . . . ." 28 U.S.C. § 517.

BACKGROUND

A. Factual and Procedural Background[2]

Plaintiff, Kahraman Sadikoglu, commenced this action on January 14, 2011, alleging that the UNDP breached a contract, resulting in damages to him exceeding $125,000,000. *See* Complaint. Plaintiff alleges that the UNDP contracted in May 2003 with Tuzla Tersanecilik Anorum Sirjeti ("Tuzla"), a Turkish company owned by Plaintiff, to provide salvage work in the Umm-Qasr Port (the "Port") in Iraq.[3] *See* Complaint, at ¶ 27. According to the Complaint, Tuzla was originally hired by the Government of Iraq in January 2001 to remove ships that had been sunk in the Port during the first Gulf War and the Iran-Iraq War. *Id.* ¶ 21. Plaintiff claims that, after the invasion of Iraq and the removal of Saddam Hussein, the UNDP contracted with Tuzla to continue its work and to perform additional services. *Id.* ¶ 23–25. The Complaint alleges that after Tuzla successfully completed the services, "UNDP refused to pay Tuzla or Mr. Sadikoglu, refused to arbitrate the dispute, and refused to provide any other meaningful mechanism to resolve the contract dispute between the parties." *Id.* ¶ 55.

After filing his Complaint on January 14, 2011, Plaintiff unsuccessfully attempted to serve the UNDP. Following subsequent briefing, the Court entered an order authorizing Plaintiff to serve the UNDP by alternative means. *See* Dkt. No. 22 (Order entered May 9, 2011). The docket sheet reflects that Plaintiff has undertaken to effect service as provided in that order.

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[2] This summary is drawn from the complaint and the case file in this action. The United States takes no position on these allegations.

[3] Plaintiff alleges that he was the majority owner of Tuzla at the time of its contract with the UNDP. *See* Complaint at ¶ 1. Plaintiff further alleges that he later transferred his ownership interest in Tuzla, but claims that by agreement he retained the right to pursue this claim against UNDP. *Id.*

Plaintiff also has filed a memorandum (the "April 18 Mem.") setting forth its contentions as to the permissibility of this action notwithstanding the UNDP's immunities. *See* Dkt. No. 16 (filed on April 19, 2011).

The United States makes this submission not as counsel to the UN, but rather in furtherance of the United States' own interests, and consistent with the United States' obligations as host nation to the UN and as a party to treaties governing the affairs and immunities of the UN.

B. Immunity of United Nations

The UN Charter provides that the UN "shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes." UN Charter, art. 105, § 1. The UN's General Convention, which the UN adopted shortly after the UN Charter, further defines the UN's privileges and immunities, providing that "[t]he United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity." General Convention, art. II, § 2. As this Court has recognized, the United States is a party to both treaties. *See Askir v. Boutros-Ghali*, 933 F. Supp. 368, 371 (S.D.N.Y. 1996).

The UNDP is a program that reports directly to the General Assembly, one of the six principal organs of the UN. *See* United Nations: Structure and Organization, http://www.un.org/en/aboutun/structure/ (last visited June 18, 2011). As an integral part of the United Nations, the UNDP is covered by the General Convention. *See infra* at 4-5. Plaintiff has not alleged or shown evidence of any waiver of immunity by the UN. *See generally* Complaint.

DISCUSSION

THE UNDP IS IMMUNE FROM THIS SUIT

A. The UN Enjoys Absolute Immunity

The UN General Convention, to which the United States is a party, explicitly provides that the UN is absolutely immune from suit in the absence of an express waiver – indeed, "from every form of legal process." General Convention, art. II,§ 2.

The United States understands this provision to mean what it unambiguously says: the UN, including, here, its integral component the UNDP, enjoys absolute immunity from this or any suit unless the UN itself expressly waives its immunity. There is no allegation, much less evidence, that the UN has waived its immunity here. On the contrary, the UN itself expressly maintains its immunity, including the UNDP's, from this suit. *See* letters dated January 18 and April 14, 2011, from Stephen Mathias, Assistant Secretary-General in charge of UN Office of Legal Affairs, to Russell Graham, U.S. Mission to the UN, annexed (without enclosures) hereto respectively as Exhibits 1 and 2.

To the extent there could be any contrary reading of the General Convention's text, the Court should defer to the United States Executive Branch's interpretation. *See Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961) ("While courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight"). Here, the Executive Branch, and specifically the Department of State, is charged with maintaining relations with the United Nations, and so its views are entitled to deference under, *inter alia*, *Kolovrat*. The Executive Branch's interpretation should be given still greater deference in this case since, as noted above, the interpretation is

shared by the UN. *See Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 185 (1982) (where parties to treaty agree on meaning of treaty provision, and interpretation "follows from the clear treaty language, [the court] must, absent extraordinarily strong contrary evidence, defer to that interpretation").

Consistent with the applicable treaty language and the Executive Branch's views, courts repeatedly, and indeed to the United States' knowledge uniformly, have recognized that "[u]nder the Convention the United Nations' immunity is absolute, subject only to the organization's express waiver thereof in particular cases." *Boimah v. United Nations General Assembly*, 664 F. Supp. 69, 71 (E.D.N.Y. 1987); *see also, e.g.*, *Askir*, 933 F. Supp. at 371. Controlling Second Circuit authority recognizes the UN's absolute immunity. *See Brzak*, 597 F.3d at 112 ("the United Nations enjoys absolute immunity from suit unless 'it has expressly waived its immunity.'"). As the *Brzak* district court held, "where, as here, the United Nations has not waived its immunity, the General Convention mandates dismissal of Plaintiffs' claims against the United Nations for lack of subject matter jurisdiction." *See Brzak*, 551 F. Supp. 2d at 318.

The UNDP, as an integral program of the UN, enjoys this same absolute immunity. Indeed, the Office of Legal Affairs of the United Nations equated the UNDP with the United Nations when requesting that the United States take action to assert the UN's immunity in this case. *See* Exhibit 1 (UNDP included in parentheses after reference to UN), Exhibit 2 (UNDP implicitly recognized as part of UN); *see also De Luca v. United Nations Org.*, 841 F. Supp. 531, 534 (S.D.N.Y. 1994) (recognizing the Acting Chief of the Internal Audit Section of the UNDP as a UN officer entitled to immunity); *Boimah, supra* (finding that the General Assembly enjoys the same immunities as the UN); *Shamsee v. Shamsee*, 428 N.Y.S.2d 33 (N.Y. App. Div. 1980)

(finding that the UN Joint Staff Pension Fund enjoys the UN's immunities); *Hunter v. United Nations*, 800 N.Y.S.2d 347, 2004 WL 3104829 (N.Y. Sup. Ct. 2004) (finding that UNICEF, as a UN agency, enjoys the UN's immunities).

B. Plaintiff's Arguments to Limit or Disregard the UN's Immunities Under the General Convention Lack Merit

There is no merit to Plaintiff's contention that the UN enjoys only functional, not absolute, immunity, and that the UN's assertedly functional immunity does not extend to the alleged private contract in this case, which Plaintiff alleges constitutes commercial activity. According to Plaintiff, *see* April 18 Mem. at 6, the UN Charter provides only for functional immunity because it states that the UN shall enjoy "such privileges and immunities as are necessary for the fulfillment of its purpose." He further argues that commercial activities are not "necessary for the fulfillment of [the UN's] purpose," and therefore are not covered by the immunity granted by the UN Charter. *See* April 18 Mem. at 8-9.

Plaintiff is incorrect. While the UN Charter does not explicitly state what exact nature and extent of immunity is "necessary for the fulfillment of" the UN's purposes, the General Convention eliminates any possible ambiguity by providing that "[t]he United Nations . . . shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity." General Convention, art. II, § 2. It is easy to understand why the UN would need such broad immunity; without it, it could be subject to over 190 disparate legal systems. As noted, courts, including the Second Circuit, have recognized the UN's absolute immunity under the General Convention. *See, e.g.*, *Brzak*, 597 F.3d at 112; *Askir*, 933 F. Supp. at 371; *De Luca*, 841 F. Supp. at 533; *see generally supra* at 5 (citing additional cases).

Plaintiff's argument also is inconsistent with the plain meaning of Article II, Section 2 of the General Convention. While he is correct that the General Convention requires the UN to establish arbitration procedures to settle contract disputes, *see* April 18 Mem. at 7 (quoting General Convention, art. VIII, § 29(a) (UN "shall make provisions for appropriate modes of settlement" of contract disputes)); *see also id.* at 9 (quoting UN Report regarding implementation of General Convention, art. VIII, § 29(a), setting forth UN policy of arbitrating "disputes that cannot be settled by direct negotiations"), these provisions do not even remotely suggest that the UN has somehow waived its immunity from "legal process." Indeed, these provisions actually complement the UN's absolute immunity, and do not justify ignoring or limiting it as Plaintiff suggests.[4] The UN's provisions for non-judicial dispute resolution provide an alternative to judicial proceedings that mitigates any effects of the UN's immunity from suit or process in member states' court systems. However, nothing in the procedures Plaintiff invokes purports to limit or waive the UN's immunity from judicial proceedings.

Also incorrect is Plaintiff's contention that, if the General Convention were read to provide for absolute immunity, it would conflict with the UN Charter and to that extent would be inoperative pursuant to Article 103 of the UN Charter.[5] *See* April 18 Mem. at 6-7. Plaintiff has not established, and cannot establish, the conflict with the UN Charter on which his argument depends. The General Convention's plain language providing for absolute immunity does not

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[4] The UN itself has stated that Plaintiff in this case is "not without redress" and states that it has been engaged with him in ongoing consultations. *See* Exhibit 1.

[5] Article 103 provides that "[i]n the event of a conflict between the obligations of the Members of the [UN] under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." UN Charter, art. 103.

conflict with the UN Charter because, at the time the General Convention was adopted, the then-recently-adopted UN Charter had left that possibility open by not specifying the extent of immunity enjoyed by the UN. Indeed, the UN Charter itself anticipated the possible subsequent issuance of a convention setting forth a more specific definition of the scope of the UN's immunity: Article 105, § 3 of the UN Charter specifically provides that "[t]he General Assembly may make recommendations with a view to determining the details" of the immunity provided to the UN in Article 105(1), "or may propose conventions to the Members of the United Nations for this purpose." UN Charter, art. 105, § 3. The General Convention served this purpose; as courts have recognized, "[t]he General Convention defines the privileges and immunities relating to the United Nations and its officials." *Brzak*, 551 F. Supp. 2d at 317; *see also* General Convention, preamble. Not surprisingly, Plaintiff cites no decision that has held that the General Convention's grant of immunity conflicts with the UN Charter and may be ignored.

Plaintiff also is not aided by his argument that the United Nations Office of Legal Affairs ("OLA"), in its legal opinions, assertedly has recognized that the UN's immunity does not extend to commercial activity. *See* April 18 Mem. at 14-15. As an initial matter, as evidenced by the two attached letters from the UN's OLA itself, the UN expressly maintains its immunity from suit in this case. *See* Exhibits 1 and 2 hereto. Moreover, the OLA opinions cited by Plaintiff do not suggest that the UN understands its own immunity to be limited. Plaintiff first points to a 1990 OLA Opinion, *see* April 18 Mem. at 14, that addressed "the advisability of the United Nations entering into a profit-making joint venture with a private publishing firm." 1990 United Nations Juridical Yearbook, at 257. The OLA advised that the UN's immunity is "granted on the understanding that the Organization pursues only its Charter objectives. If, however, the

Organization were to participate in a commercial joint venture, it would (at least in respect of the joint venture) have to waive its privileges and immunities, the granting of which would no longer be justified." *Id.* at 258. Contrary to Plaintiff's assertion, that opinion does not suggest that the UN has limited immunity. Nowhere in the opinion did OLA suggest that the UN would not enjoy immunity, absent waiver, in the circumstances addressed. Rather, it suggested that the UN has absolute immunity, but that it should waive that immunity before entering into purely commercial ventures, "at least in respect of the joint venture." *Id.* Here, of course, there is no evidence that the UN waived its immunity. Moreover, although no further distinguishing is required, there are other factual distinctions between the two cases: the war-zone salvage operations at issue in this case are much more readily associated with the UN's core mission than the purely commercial venture under discussion in the 1990 OLA Opinion, and the UN here did not join a profit-making "joint venture" with another, non-immune entity.

Plaintiff also points to a 1999 OLA Opinion, *see* April 18 Mem. at 15, addressing the potential participation of UN organizations in competitive bidding exercises conducted by governments. *See* 1999 United Nations Juridical Yearbook, at 418–23. That opinion noted that the UN organizations' immunity "may give them an advantage over their private competitors that enables them to provide States with the required assistance at a lower economic cost. Since this is consistent with the mandates of those organizations . . . it is unclear why this should be a basis for excluding those entities." *Id.* at 421. It also recognized "[t]he risk of challenge to the immunity of [the UN]," but noted that "[a]s far as we are aware, no attempt to apply the restrictive theory [of immunity] to the United Nations has been successful." *Id.* at 422. Contrary to Plaintiff's arguments, that opinion does not suggest that the UN understands its own immunity

to be limited; rather, it suggests that the UN considered its contemplated activities to be immune, and that, so far as the UN was aware, any challenge would have been unsupported by precedent.

Finally, Plaintiff has presented no law or evidence indicating that OLA opinions are binding on either the United States Government or the courts as to the interpretation of the United States Government's obligations under treaties to which it is a party.

Thus, none of Plaintiff's contentions undermines the express grant of absolute immunity set forth in the General Convention.

C. The IOIA Did Not and Cannot Create an Exemption to the UN's Absolute Immunity Granted Under the UN Charter and General Convention

Plaintiff is incorrect to contend that the International Organizations Immunity Act ("IOIA"), 22 U.S.C. § 288 *et seq.*, limits the immunities afforded the UN in the General Convention to those enjoyed by foreign governments under the Foreign Sovereign Immunity Act ("FSIA"), 28 U.S.C. §§ 1330, 1602 *et seq.*[6] It is an open question in the Second Circuit whether, in any circumstances, the IOIA incorporates FSIA's exception to sovereign immunity for international organizations' commercial activities or whether it incorporates the absolute immunity that foreign governments enjoyed at the time of the IOIA's enactment. *See Brzak*, 597 F.3d at 112.

This question does not matter here, however, because the UN Charter and General Convention make the UN absolutely immune, and the Second Circuit in a controlling decision has held that those provisions preclude a challenge to the UN's immunity based on the IOIA. *See*

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[6] The FSIA governs immunities of foreign sovereigns from suits in the United States, and provides an exception to sovereign immunity for commercial activities. *See* 28 U.S.C. § 1605(a)(2).

id. As the Second Circuit recognized: "[W]hatever immunities are possessed by other international organizations [subject to the IOIA], the [General Convention] unequivocally grants the United Nations absolute immunity without exception." *Id.* Thus, Plaintiff's invocation of the IOIA here is unavailing.

D. The Court Cannot Exercise Jurisdiction Over the UN If Absolute Immunity Applies, Regardless of Whether Other Fora Are Available

Finally, even assuming *arguendo* that Plaintiff is correct that recognizing the UN's absolute immunity would leave Plaintiff with no forum to resolve his claim, the UN's immunity still precludes the Court from exercising jurisdiction over the UN, contrary to Plaintiff's argument. *See* April 18 Mem. at 15. The UN's immunity under Section 2 of the General Convention is not contingent upon the UN's making provision for an appropriate mode of settlement pursuant to Section 29.

In support of his argument, Plaintiff invokes the principle of international law *pacta sunt servanda* ("agreements must be kept"), *see* April 18 Mem. at 16, and relies on a decision of a French court, the Court of Appeals of Paris, directing UNESCO to undertake arbitration, as required by contract. *See UNESCO v. Boulois*, Cour d'Appel, Paris, June 19, 1998, 1999 Yearbook Commercial Arbitration (Kluwer) 294–95. However, based on available information, this case is distinguishable. First, the French court based its decision on UNESCO's having entered a written contract that contained an arbitration clause; to our knowledge, there is no such arbitration clause alleged in this case. Second, the French court relied on the European Convention on Human Rights (ECHR), arguing that a refusal to appoint an arbitrator under a contractual arbitration clause would violate a provision of the ECHR; that provision is not

alleged to apply here. Finally, the French court was not asked to and did not exercise jurisdiction over UNESCO on the substance of the dispute, but instead merely directed UNESCO to appoint an arbitrator; here, Plaintiff asks this Court to resolve the substance of his dispute with the UNDP. In any case, Plaintiff has identified no United States case law in support of his position, thus leaving undisturbed the uniform body of this country's law enforcing the UN's absolute immunity.

Indeed, the Second Circuit in *Brzak* rejected a contention similar to Plaintiff's here: "Although the plaintiffs argue that purported inadequacies with the United Nations' internal dispute resolution mechanism indicate a waiver of immunity, crediting this argument would read the word 'expressly' out of the [General Convention]." *Brzak*, 597 F.3d at 112. This observation applies with equal force here. Indeed, there is no basis to conclude that invoking the international law principle of *pacta sunt servanda* could ever enable a party to overcome the UN's treaty-based immunities, which themselves are entitled to be followed under the very same international law principle, merely based on allegations that the UN has breached a contract or violated a policy of submitting disputes to arbitration. Such an exception would swallow the applicable immunities and risk repeatedly embroiling the UN in litigation, thereby defeating the precise intent of the relevant treaty provisions. Accordingly, Plaintiff has provided no basis to disregard the UN's absolute immunity.

CONCLUSION

For the reasons stated above, the UN, including the UNDP enjoys absolute immunity, and the Court therefore lacks subject matter jurisdiction over this action.

Dated: New York, New York
July 6, 2011

Respectfully submitted,

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